No. 91-594

In the Supreme Court of the United States

OCTOBER TERM, 1991

AMERICAN NATIONAL RED CROSS, PETITIONER

v.

S.G. AND A.E.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether 36 U.S.C. 2, which provides that petitioner shall have "the power to sue and be sued in courts of law and equity, State or Federal," vests federal courts with original jurisdiction over actions to which petitioner is a party.

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INTEREST OF THE UNITED STATES

This case involves the right of the American National Red Cross (the Red Cross) to remove to federal court cases brought against it in state courts. The case implicates two important interests of the United States. First, as this Court has recognized, the Red Cross is important to the government of the United States because of the Red Cross's obligation "to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need." *Department of Employment* v. *United States*, 385 U.S. 355, 359 (1966). Accordingly, the United States in the past has appeared in this Court to de-

fend the prerogatives Congress has granted to the Red Cross.

Second, several statutes governing the capacities of important federal instrumentalities contain language similar in some respects to the language in the Red Cross's charter at issue in this case. The United States has an interest in ensuring that such language is interpreted in a way that will allow those federal instrumentalities to remove to federal court cases brought against them in state courts.

STATEMENT

1. In March 1990, respondents instituted this suit in the Superior Court of Merrimack County, New Hampshire, contending that petitioner was responsible for injuries respondent A.E. sustained during a surgical operation in 1984. Petitioner removed the suit to the United States District Court for the District of New Hampshire under 28 U.S.C. 1441(a). Petitioner contended that the federal court would have had original jurisdiction over the case pursuant to 36 U.S.C. 2, which provides that petitioner shall have "the power to sue and be sued in courts of law and equity, State or Federal." [1]

2. The district court held that it had jurisdiction. Pet. App. 18a-25a. Relying on *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), in

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[1] Section 1441(a) provides for removal jurisdiction only in cases where the action brought in state court is one "of which the district courts of the United States have original jurisdiction." Accordingly, removal jurisdiction was proper only if the federal district court would have had jurisdiction over the case as an original matter. See 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3721 (2d ed. 1985).

which this Court held that similar language in the charter of the second Bank of the United States established federal jurisdiction over actions against the Bank, the court concluded that 36 U.S.C. 2 granted federal jurisdiction over all cases to which petitioner is a party. Pet. App. 24a. Recognizing the importance of the issue, the district court certified the decision for interlocutory appeal under 28 U.S.C. 1292(b). *Id.* at 26a-30a.

3. The court of appeals reversed. Pet. App. 1a-16a. It noted the authority of *Osborn* (*id.* at 5a-7a), but concluded that *Osborn* did not apply to petitioner because petitioner's charter is worded differently than the charter at issue in *Osborn*. First, the court of appeals noted that the charter in *Osborn* referred to "state courts having competent jurisdiction." *Id.* at 9a (emphasis omitted) (quoting *Osborn*, 22 U.S. (9 Wheat.) at 817). In the court's view, the lack of a reference to "jurisdiction" in petitioner's charter suggested that Congress was not concerned with jurisdiction when it crafted the Red Cross's charter. Second, the court noted that the Red Cross's charter refers to a right to sue in federal and state courts generally, whereas the charter at issue in *Osborn* referred more specifically to the courts in which the power to sue could be exercised. Pet. App. 10a; see 22 U.S. (9 Wheat.) at 817. The court concluded that the lack of reference to any particular courts supported its conclusion that Congress intended petitioner's charter to grant only the capacity to sue, without granting jurisdiction to any particular court. Pet. App. 10a. Finally, the court of appeals concluded that the legislative history of 36 U.S.C. 2 supported its conclusion that the charter did not grant jurisdiction because that history "evinces no clear intent

on the part of Congress to confer original jurisdiction." Pet. App. 12a. Accordingly, the court reversed the district court's decision and remanded with instructions to remand the case to state court.

SUMMARY OF ARGUMENT

This Court's decisions have established a clear rule that congressional charters provide for original jurisdistion in the federal courts whenever they specifically grant a right to sue and be sued in federal courts. In *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 85-86 (1809), and *Bankers Trust Company* v. *Texas & Pacific Railway*, 241 U.S. 295, 303-305 (1916), this Court concluded that charters with only a general reference to "courts of record" or to "courts of law and equity" would not provide for original federal jurisdiction. By contrast, in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 817-818 (1824), and in *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U.S. 447, 455-456 (1942), the Court concluded that charters referring to the "circuit courts of the United States" or to all courts, "State or Federal," did provide for original federal jurisdiction.

The Red Cross's charter grants it the power to sue and be sued in all courts, "State or Federal"; it consequently should be construed to provide for original federal jurisdiction over cases involving petitioner. Congress employed this language after this Court had found the language sufficient to vest federal jurisdiction. Accordingly, this Court should follow its earlier cases and give that effect to the language in the Red Cross's charter.

ARGUMENT

THE LANGUAGE CONGRESS USED IN PETITIONER'S CHARTER IS SUFFICIENT TO ESTABLISH FEDERAL JURISDICTION

On four separate occasions—all prior to 1947, when Congress enacted the portion of the Red Cross's charter at issue in this case—this Court has considered whether particular language by which Congress had described the powers of federally chartered entities was sufficient to grant the federal courts jurisdiction over actions by and against those entities. The language in two of the cases was held insufficient to grant jurisdiction [2]; the language in the other two cases was found sufficient.[3] A comparison of those cases with the language Congress chose for petitioner's charter demonstrates that the Red Cross's charter should be held sufficient to vest jurisdiction in the federal courts over all cases to which petitioner is a party.

I. A CHARTER THAT GRANTS THE SPECIFIC POWER TO SUE AND BE SUED IN THE COURTS OF THE UNITED STATES IS SUFFICIENT TO VEST FEDERAL JURISDICTION OVER ALL CASES TO WHICH THE CHARTERED ENTITY IS A PARTY

This Court first considered whether congressional charters created federal jurisdiction over cases involving federally chartered entities in *Bank of the*

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[2] *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 85-86 (1809); *Bankers Trust Co.* v. *Texas & Pacific Railway*, 241 U.S. 295, 303-305 (1916).

[3] *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 817-818 (1824); *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U.S. 447, 455-456 (1942).

United States v. *Deveaux*, 9 U.S. (5 Cranch) 61 (1809), which presented an action brought in federal court by the Bank of the United States. *Id.* at 62. The Bank's charter provided that the Bank would be "able and capable in law * * * to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever." Act of Feb. 25, 1791, ch. 10, § 3, 1 Stat. 192; see 9 U.S. (5 Cranch) at 85. Writing for a unanimous Court, Chief Justice Marshall concluded that this clause was not sufficient to create federal jurisdiction, explaining that the power granted by this clause "is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognisance of the cause, if brought by individuals." 9 U.S. (5 Cranch) at 85-86. In sum, the charter "evinces the opinion of congress, that the right to sue does not imply a right to sue in the courts of the Union, unless it be expressed." *Id.* at 86.

Only 15 years later, the Court had occasion to consider what type of expression *would* be adequate to confer a right to sue in the courts of the Union. The occasion was *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), involving the second Bank of the United States. The charter of the second Bank varied slightly from the charter at issue in *Deveaux*; Congress had replaced the phrase allowing the first Bank to sue or be sued in "courts of record, or any other place whatsoever," with a more detailed reference allowing suits "in all state courts having competent jurisdiction, and in any circuit court of the United States." Act of Apr. 10, 1816,

ch. 44, § 7, 3 Stat. 269; see *Osborn*, 22 U.S. (9 Wheat.) at 817.[4] The Court (again through Chief Justice Marshall) concluded that the difference in language took the case outside *Deveaux*. In the Court's view, the words of the new charter "admit of but one interpretation" and "cannot be made plainer by explanation." 22 U.S. (9 Wheat.) at 817. Because the words "give, expressly, the right 'to sue and be sued,' 'in every Circuit Court of the United States,'" (*ibid.*) Chief Justice Marshall stated that this charter, unlike the charter in *Deveaux*, granted federal jurisdiction over actions by the Bank. He explained the distinction from *Deveaux* as follows: "[*Deveaux*] amounts only to a declaration, that a general capacity in the Bank to sue, *without mentioning the courts of the Union*, may not give a right to sue in those Courts." 22 U.S. (9 Wheat.) at 818 (emphasis added).[5]

Many years later, the distinction between the charters at issue in *Osborn* and *Deveaux* was clarified further in *Bankers Trust Company* v. *Texas & Pacific Railway*, 241 U.S. 295 (1916). That case

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[4] The capitalization of the references to "state courts" and the "circuit courts" that appears in the Court's quotation of the statute, see 22 U.S. (9 Wheat.) at 817, does not appear in Statutes at Large. Compare Pet. App. 5a-6a (quoting this passage without the capitalization); *Bankers Trust*, 241 U.S. at 304 (quoting this passage with partial capitalization).

[5] The Court in *Osborn* went on to conclude that the statutory grant of jurisdiction made in the terms of the charter was permissible under Article III of the Constitution, because the existence of the charter gave the case an "ingredient" of federal law, and because that "ingredient" was sufficient to make the case "arise under" federal law for purposes of Article III, Section 2 of the Constitution and thus fall within the constitutionally permissible boundaries of the federal judicial power. 22 U.S. (9 Wheat.) at 823-825.

involved an action against the Texas and Pacific Railway Company, which had been created by a congressional charter granting it the power "to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States." Act of Mar. 3, 1871, ch. 122, § 1, 16 Stat. 574; see *Bankers Trust*, 241 U.S. at 303. The Court unanimously concluded that the case was controlled by *Deveaux*, and thus that this provision of the charter did not grant jurisdiction. The Court noted that the differing result in *Osborn* rested on the reference in the *Osborn* charter to power to sue "in all state courts having competent jurisdiction, and in any Circuit Court of the United States," which "amounted to an express grant of jurisdiction to the Circuit Courts." *Bankers Trust*, 241 U.S. at 304.[6]

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[6] The Court went on to consider an alternate basis for jurisdiction, Section 1 of the Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, which granted the federal circuit courts general jurisdiction over cases "arising under" federal law. 241 U.S. at 305-309. The Court noted the constitutional holding in *Osborn*, see note 5, *supra*, that the existence of a federal charter gave all cases involving federally chartered entities a sufficient "ingredient" of federal law to cause the case to "arise under" federal law for purposes of Article III of the Constitution. 241 U.S. at 305-306. Accordingly, the Court concluded, jurisdiction would have been proper under *Osborn* and the 1875 Act absent some other statute limiting jurisdiction. 241 U.S. at 307. Finally, the Court held that jurisdiction was inappropriate, finding that a 1915 statute had withdrawn general "arising-under" jurisdiction under the 1875 Act to the extent the case arose under federal law solely because of the federal incorporation of railroad companies. See *id.* at 307-309; Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 804 ("No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."); see also 13B C. Wright, A. Miller & E. Cooper, *Fed-*

Fifty years ago, the Court's most recent statement regarding the effect on federal jurisdiction of a clause granting a federally chartered entity the power to sue and be sued appeared. *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942), involved an action brought by the FDIC, a federally chartered entity that had the power to "sue and be sued, complain and defend, in any court of law or equity, State or Federal." Banking Act of 1933, ch. 89, § 8, 48 Stat. 172; see 315 U.S. at 455. *D'Oench, Duhme* is best known for its recognition of a federal common-law rule protecting the FDIC from claims based on secret agreements not evident from official bank records,[7] but a finding of federal jurisdiction was necessary to the decision of the case. The Court readily found dispositive the language of the charter referring to "Federal" courts.[8] The Court specifically noted that jurisdiction was "not based on diversity of citizenship," but on the language of the

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eral Practice and Procedure § 3562, at 20-24 (2d ed. 1984) (discussing the distinction between the broad range of "arising-under" jurisdiction that *Osborn* held the Constitution permitted and the more limited range of "arising-under" jurisdiction Congress actually has vested in the federal courts).

[7] See 315 U.S. at 456-462; see also *Langley* v. *Federal Deposit Insurance Corporation*, 484 U.S. 86, 92-93 (1987) (discussing *D'Oench, Duhme* and its statutory successor, 12 U.S.C. 1823(e)).

[8] The only significant difference between this charter—which referred to "any court of law or equity, State or Federal"—and the charter found inadequate in *Deveaux*—which referred to "courts of record," see *Deveaux*, 9 U.S. (5 Cranch) at 85—is the inclusion of the phrase "State or Federal" to describe the courts in which the power to sue could be exercised.

FDIC's charter: "Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued 'in any court of law or equity, State or Federal.' " 315 U.S. at 455.

II. BECAUSE PETITIONER'S CHARTER GRANTS THE POWER TO SUE AND BE SUED IN "COURTS OF LAW OR EQUITY, STATE OR FEDERAL," IT IS SUFFICIENT TO CREATE FEDERAL JURISDICTION OVER CASES TO WHICH PETITIONER IS A PARTY

A comparison of the language of petitioner's charter to that involved in the cases discussed above, and examination of the circumstances leading to the enactment of that charter, demonstrates that the Red Cross's charter creates federal jurisdiction over cases to which petitioner is a party.

The Red Cross's first congressional charter was enacted in 1905. It granted the "power to sue and be sued in courts of law and equity within the jurisdiction of the United States." Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600. Because this language does not "mention[] the Courts of the Union," *Osborn*, 22 U.S. (9 Wheat.) at 818, it would not have been sufficient under *Osborn* and *Deveaux* to vest federal jurisdiction. Compare *Bankers Trust*, 241 U.S. at 303-304 (finding that a charter referring to "all courts of law and equity within the United States" was "not intended to confer jurisdiction").

This is not surprising. When the charter was passed in 1905, it was well established that another basis for federal jurisdiction existed in cases by or against petitioner. At that time, federal courts had jurisdiction over any action by or against a federally chartered entity, based on (a) the ruling in *Osborn* that cases to which a federally chartered entity is a

party involve an ingredient of federal law sufficient to make such cases arise under federal law for purposes of Article III of the Constitution, see note 5, *supra*, and (b) enactment of Section 1 of the Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, which granted the federal circuit courts jurisdiction over all cases "arising under" federal law. See *Pacific Railroad Removal Cases*, 115 U.S. 1, 11-14 (1885); C. Wright, *Handbook of the Law of Federal Courts* § 17, at 92-93 (4th ed. 1983) (discussing the *Pacific Railroad Removal Cases*).

This changed in 1925. In that year, Congress limited the general federal jurisdiction granted by the 1875 Act, by providing that the district courts would "not have jurisdiction of any [civil] action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, * * * [unless] the United States is the owner of more than one-half of its capital stock." Act of Feb. 13, 1925, ch. 229, § 12, 43 Stat. 941 (codified at 28 U.S.C. 1349).[9]

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[9] It seems clear from this Court's opinion in *Bankers Trust* that the effect of the 1925 Act was to limit only the "arising-under" jurisdiction created by the 1875 Act—which the *Pacific Railroad Removal Cases* had construed to include all cases to which any federally chartered entity was a party, without regard to the language of the entity's charter—but not jurisdiction under the rule of construction *Osborn* established for congressional charters. In *Bankers Trust*, this Court was confronted with a claim by a federally chartered entity that federal jurisdiction rested on two separate grounds: the language of its charter and the 1875 Act. This Court treated both grounds separately. First, it concluded that the language of the charter was inadequate under the rules established in *Deveaux* and *Osborn*. 241 U.S. at 303-305. Second, it concluded that the 1875 Act was insufficient to establish jurisdiction because of Section 5 of the Act of Jan.

Accordingly, when the Harriman Committee issued its 1946 report recommending revisions to petitioner's charter, it recommended that petitioner's right to sue in the federal courts be clearly stated.[10] Based on this report,[11] Congres revised the language of the pre-existing charter to add the words "State or Federal" to the clause granting the right to sue and be sued, so that the clause now grants the "power to sue and be sued in courts of law and equity, State or Federal." Compare 36 U.S.C. 2 with Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600.

28, 1915, ch. 22, 38 Stat. 804, which had withdrawn jurisdiction based "upon the ground that [a] railroad company was incorporated under an Act of Congress." See *Bankers Trust*, 241 U.S. at 305-309; note 6, *supra*.

If the 1915 Act directed at railroads—the operational portion of which is worded almost identically with the broader 1925 Act directed at all federally chartered entities—had limited not only general "arising-under" jurisdiction, but also jurisdiction based on specific charter provisions, the Court would have had no occasion to consider the adequacy of the specific charter at issue in *Bankers Trust*, but instead could have found jurisdiction improper simply by relying on the 1915 Act. There is no reason to read any broader effect into the very similar language in the 1925 Act (now codified at 28 U.S.C. 1349).

[10] The report noted that petitioner's "powers [to sue in the Federal Courts] have not been questioned. However, in view of the limited nature of the jurisdiction of the Federal Courts it seems desirable that this right be clearly stated in the Charter." *Report of the Advisory Committee on Organization* 35-36 (June 11, 1946), C.A. App. 132-133.

[11] See S. Rep. No. 38, 80th Cong., 1st Sess. 1 (1947) (Senate Report for 36 U.S.C. 2; noting that the statute was based on the Harriman Committee report); H.R. Rep. No. 337, 80th Cong., 1st Sess. 6 (1947) (House Report for 36 U.S.C. 2; noting that the statute was based on the Harriman Committee report).

In light of the decisions of this Court discussed above, there can be little doubt that Congress reasonably believed that the addition of this language would indeed vest federal jurisdiction over actions by or against the Red Cross. The language as revised bears a striking resemblance to that approved only five years earlier in *D'Oench, Duhme*. Compare 36 U.S.C. 2 (granting power to sue and be sued "in courts of law and equity, State or Federal"), with *D'Oench, Duhme*, 315 U.S. at 455 (finding federal jurisdiction based on language authorizing FDIC to sue or be sued "in any court of law or equity, State or Federal"). Moreover, the addition of a specific reference to "Federal" courts closely follows the prescription of Chief Justice Marshall in *Osborn*, namely that charters granting the power to sue and be sued would not vest jurisdiction in the federal courts "without mentioning the Courts of the Union." 22 U.S. (9 Wheat.) at 818.

The court of appeals' reasoning, by contrast, assumes that the amendment was intended to have no effect whatsoever; the charter already granted the capacity to sue in all courts of law and equity within the jurisdiction of the United States, so an additional grant of the capacity to sue in state and federal courts would add nothing. Compare *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990) (noting the "established principle that a court should 'give effect, if possible, to every clause and word of a statute' "). Moreover, the basis for the decision of the court of appeals finds no support in the relevant decisions of this Court. The court of appeals' reliance on the absence of references to courts "of competent jurisdiction" or to specific courts—such as the reference to circuit courts of the United States presented by the charter in *Osborn*, see

22 U.S. (9 Wheat.) at 817—flies in the face of this Court's interpretation of a similar clause in *D'Oench, Duhme*, 315 U.S. at 455 (finding jurisdiction based on a clause granting the right to sue in federal courts, although the clause referred neither to courts "of competent jurisdiction" nor to any specific state or federal courts).

To be sure, the court of appeals was correct (Pet. App. 10a-11a) that jurisdiction in *D'Oench, Duhme* also could have rested on the statute granting federal jurisdiction over cases arising under federal law, see 28 U.S.C. 1331, because the FDIC's operative statutes also provided that "suits of a civil nature * * * to which the [FDIC] shall be a party shall be deemed to arise under the laws of the United States." Banking Act of 1935, ch. 614, § 101, 49 Stat. 692; see 315 U.S. at 455 n.2. But whatever other bases for jurisdiction may have been apparent from the record, it remains the case that the *D'Oench, Duhme* Court found jurisdiction proper under the charter. The issue in this case is what meaning should be attributed to the language Congress selected for petitioner's charter. In light of the general presumption that Congress is aware of the law when it drafts statutory language, see, *e.g.*, *Albernaz* v. *United States*, 450 U.S. 333, 341-342 (1981), it makes perfect sense to assume that Congress chose the particular language that it did in light of this Court's treatment of that same language in *D'Oench, Duhme*. It makes no sense to assume, as did the court of appeals, that Congress did not intend the language to be treated like the language in *D'Oench, Duhme* because of the existence of an alternate basis for disposition that the Court could have adopted but did not even discuss.

In our view, the court of appeals' decision rested on an implicit dissatisfaction with this Court's construction of the charter provisions at issue in *Osborn* and *D'Oench, Duhme*. Whatever the merits of that view as an abstract proposition, the fact remains that Congress formulated the Red Cross's charter after those decisions had given the words Congress chose a settled meaning. Congress was entitled to assume that it could establish jurisdiction by using language that this Court repeatedly had found sufficient for the purpose. See, *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988) (noting "the well-settled presumption that Congress understands the state of existing law when it legislates"). To reach a different result at this point based on possible dissatisfaction with the reading adopted by Chief Justice Marshall and his colleagues in *Osborn* would intrude unduly on Congress' reasonably settled expectations regarding the manner in which this Court would interpret that language. Compare *Welch* v. *Texas Department of Highways & Public Transportation*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring in part and concurring in the judgment) ("Regardless of what one may think of [one of this Court's 19th Century decisions], it has been assumed to be the law for nearly a century. * * * Even if we were now to find that assumption to have been wrong, we could not, in reason, interpret the statutes as though the assumption never existed.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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